

(3)
No. 87-1590

**In the
Supreme Court of the United States**

OCTOBER TERM, 1987

HARRY SAGANSKY,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

**ON A PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

REPLY BRIEF FOR HARRY SAGANSKY, PETITIONER

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Pursuant to United States Supreme Court Rule 22.5, Petitioner Harry Sagansky hereby files a Reply Brief "addressed to arguments first raised in the brief in opposition."

ARGUMENT

The Government has raised for the first time in its Brief in Opposition to the Petition for Writ of Certiorari the argument that the issue in this matter is simply and strictly factual — the

state of the Petitioner's health and the effect of confinement in a prison medical facility on it. In support of its assertion that there is no issue of law for this Court to review, the Government has incorrectly described the holdings and findings of both the district court and the Court of Appeals. The Government incorrectly states at p. 5 of its Opposition:

But the court of appeals, affirming the findings of the district court, found from the medical evidence in the record that petitioner's confinement in a medical prison facility would not endanger his life.

At p. 6, the Government restates this erroneous explanation of the court's findings and concludes that the case does not raise constitutional questions:

In light of the concurrent findings of the courts below — that incarceration will not prove fatal for the petitioner — this case does not present the constitutional questions raised in the petition.

The Government is wrong in its characterization of the holdings of the district court and the Court of Appeals. The argument expressed throughout by the Government below in this case has been that, while a witness' poor health might be a defense to a determination of contempt *if the act of testifying would endanger his health*, poor health is "irrelevant" to the issue of coercion utilized to *enforce* an order of a court. The district court (after a reconsideration prompted by the Government) agreed with this argument. A-10. Similarly, the First Circuit found that "none of the medical information suggests that the witness' *appearance or testimony before the grand jury* would be harmful to his health." A-2 (emphasis added). It was thus as a matter of law, not fact, that the courts

below found that incarceration in a medical prison facility, "transported there in an air medi-vac plane equipped with a nurse," was appropriate.¹

It is this matter of law — the constitutionality of probably fatal coercive incarceration for civil contempt — which merits review by this Court.²

Only in one sentence, in footnote 3 at page 6 of its Brief in Opposition, does the Government attempt to respond to the weighty constitutional questions presented. ("In any event, to the extent that petitioner relies on the Eighth Amendment, that reliance is misplaced.") This response is inadequate and insufficient opposition to the granting of the Writ. Only the granting of the Writ and the discipline of full briefing by the Government will compel the United States to meet its obligations in presenting a full argument to this Court.

¹ The Government's assertion, at p. 6, that neither of the Petitioner's physicians "took account of" the availability of a medical prison facility and a medi-vac plane is specious: the Government always resisted the hearings sought by the Petitioner at which the factual and medical significance of these facts might have been developed.

² This Court has this very week considered — and divided over — certain aspects of the civil-criminal contempt distinction as it implicates due process requirements. See *Hicks v. Felock*, __ U.S. __, No. 86-787 (decided April 27, 1988).

CONCLUSION

Therefore, for the reasons expressed herein and in the Petition for a Writ of Certiorari, this Court should grant the Petition and address the compelling questions of constitutional law presented, in the interests of justice and in the interests of providing needed guidance to the Government and to the lower courts in the administration of justice.

Respectfully submitted,

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